

City Service Insulation Company and David Winkelman and Thomas Mino. Case 7-CA-19520

April 25, 1983

DECISION AND ORDER

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

On September 30, 1982, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, City Service Insulation Company, Southfield, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

¹ Member Hunter adopts the Administrative Law Judge's finding that deferral is inappropriate here. In so doing, he finds it unnecessary, in view of the other factors noted by the Administrative Law Judge, to pass on whether deferral is inappropriate solely because a grievance is resolved by the parties short of arbitration or because an arbitrator's award is not in writing.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT threaten employees with discharge if they insist that we comply with the terms and conditions set forth in their collective-bargaining agreement.

WE WILL NOT interrogate employees and impliedly threaten them with reprisal if they refuse to give a statement concerning matters involved in a pending unfair labor practice charge.

WE WILL NOT discourage membership in or activities on behalf of Carpenters' District Council, Detroit and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other labor organization by reducing the working hours of employees, laying off or discharging employees, or otherwise discriminating against them in their hire or tenure of employment.

WE WILL NOT by any other means interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Thomas Mino and David Winkelman immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of pay or benefits which they may have suffered by reason of the discrimination practiced against them, with interest.

WE WILL expunge from our files any reference to the layoff or discharge of Thomas Mino and David Winkelman and notify them in writing that this has been done and that evidence of these unlawful layoffs or discharges will not be used as a basis for future discipline against them.

CITY SERVICE INSULATION COMPANY

DECISION

STATEMENT OF THE CASE

I. FINDINGS OF FACT

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before me in De-

troit, Michigan, upon an unfair labor practice complaint issued by the Acting Regional Director for Region 7 and amended at the hearing,¹ which alleges that Respondent City Service Insulation Company² violated Section 8(a)(1) and (3) of the Act. More particularly, the amended complaint alleges that Respondent constructively discharged Charging Party Thomas Mino by reducing his hours to the point where Mino requested a layoff in order to collect unemployment compensation, and that it did so because Mino sought union assistance in enforcing the terms of a collective-bargaining agreement to which Respondent was a party. The amended complaint also alleges that Respondent laid off Charging Party David Winkelman because Winkelman sought to enforce the terms of Respondent's collective-bargaining agreement. It goes on to allege that, after the reinstatement of Mino and Winkelman, pursuant to the terms of a grievance resolution, Respondent again laid them off because of their union activities, that it told them it would be futile for them to request reinstatement through the Union, threatened employees with loss of employment if they insisted on working under the terms and conditions of the collective-bargaining agreement, and coercively obtained a statement from a union witness for possible use in an unfair labor practice investigation. Respondent denies the essence of these allegations, states that Mino and Winkelman were laid off for lack of work and that, on one occasion, Mino was laid off at his own request. Respondent also contends that the grievance resolution of the first layoffs is a bar to litigation in a Board proceeding and that the joint settlement board deadlock of a grievance arising out of the second layoff also constitutes a bar to the litigation of those layoffs. Upon these contentions the issues herein were joined.³

II. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent is a family-owned company which installs insulation in homes and commercial buildings in the metropolitan Detroit area. In 1964, it designated the Michigan Carpentry Contractors Association, Inc., as its representative for collective bargaining with the Detroit Carpenters' District Council (herein sometimes called the Union) and since that time it has been covered by a series of multiemployer contracts between that Association and the Union. The contract in effect during the events here at issue ran from June 1978 until May 1982

¹ The principal docket entries in this case are as follows: A charge was filed by David Winkelman and Thomas Mino, individuals, against Respondent City Service Insulation Company on July 6, 1981; the complaint was issued against Respondent on August 28, 1981; Respondent's answer was filed October 2, 1981; a hearing was held in Detroit, Michigan, on May 25-27, 1982; briefs were filed by the General Counsel and Respondent on or before July 6, 1982.

² Respondent admits, and I find, that it is a Michigan corporation which maintains its principal place of business in Southfield, Michigan. It is engaged in the metropolitan Detroit area in the business of installing insulation in homes and commercial buildings. During the year ending June 30, 1981, Respondent purchased directly from points and places located outside the State of Michigan goods and materials valued in excess of \$50,000. Accordingly, it is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. Carpenters' District Council, Detroit and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Sec. 2(5) of the Act.

³ Errors in the transcript have been noted and corrected.

and was amended in 1980 by a supplemental agreement which permitted compensation of insulators on a footage rather than an hourly basis in most circumstances.

During the fall of 1980, Respondent employed about 14 union represented insulators, including Foreman Emil Lazar. For the most part its journeyman mechanics are assigned work on a daily basis. Late in the afternoon, they call Respondent's office to find out if there is work the following day and, if so, the location to which they should report. If they fail to call and work is available, Respondent will normally call them. Following the 1980 addendum to the contract, most mechanics worked at the contract rate of 400 feet per hour on most jobs, although some particularly difficult jobs required that they be paid a flat hourly rate, irrespective of production. The driver of the blower truck and perhaps one other employee continued to be paid on an hourly basis. All concede that the construction business was slow in the fall of 1980 and in the winter and early spring of 1981, so it was not unusual for an employee to work less than a full 35-hour week during the period of time.

Arnold Shenkman is Respondent's vice president and general manager and is the son of Respondent's president, Jack Shenkman. On or about November 20, 1980, he requested blanket insulator Thomas Mino to drive the company truck from the shop to the Republic jobsite at Eight Mile Road and Taft. It was understood that Mino would not be paid for his time in doing so. This was the first time such a request had been made to Mino. He refused. On the following day the materials were transported to the jobsite by Foreman Lazar. While they were working, Lazar asked Mino if he knew that insulators were being required to hang 500 feet per hour on that job rather than the contract rate of 400 feet per hour. Mino said he was not aware of this development and asked Lazar if he were working at 500 feet per hour. Lazar said that he was doing so because he had the choice either of working at 500 feet per hour or not working. Mino said he would see about it and called Arnold Shenkman from the superintendent's trailer. When Mino asked Shenkman about hanging insulation at 500 feet per hour, Shenkman said that he would have to do so because "all the guys are hanging it on apartments and condominiums." Mino told Shenkman that he would not do so because the contract called for 400 feet per hour. Shenkman then told him that he might as well go home because he was not going to give Mino the extra footage.

On the same evening, Respondent's other vice president, Sam Finkelstein, called Mino at his home. He began the conversation by saying that he had heard from Arnold Shenkman that Mino would not hang insulation at 500 feet per hour. Mino said, "That's right. The contract calls for 400 feet an hour." Finkelstein said, "It makes no difference to me. You want to hang it or not?" When Mino said no, Finkelstein replied, "OK. Nothing." On the following day Mino was not sent out to any job. Instead, employees Bill Dixon and George Parker were assigned to the project at Eight Mile Road and Taft. There is uncontradicted evidence in the record that it is

Respondent's normal practice to assign insulators to complete the jobs they have started.

Mino complained to his shop steward, Tony Motta, about being asked to drive the truck without compensation and about being required to work at 500 feet per hour. Motta brought the matter to the attention of Edward Malek, business agent for Local 95, a subordinate local of the Carpenters' District Council. As a result of this prompting, Malek paid a visit on Finkelstein in the company of Motta and complained to Finkelstein that he was paying Mino at the rate of 500 feet per hour in violation of the contract. Finkelstein denied that he had asked Mino to work at 500 feet an hour and told Malek that business was tight and he was having trouble getting work.

On December 11, 1980, insulator David Winkelman was assigned to work on a house being constructed by a builder named Norm Rosen at Middle Belt and Long Lake Road. Some of the ceilings were 10 to 12 feet high and in some places even higher. He asked his working partner, insulator Ray Thornton, how Thornton expected to be paid. Thornton replied he was expecting to be paid at 500 feet an hour. Winkelman asked Thornton whether he thought the house looked like an "hourly house."⁴

On the same afternoon, Winkelman phoned Arnold Shenkman and asked Shenkman how he was going to pay the job. Shenkman replied that it would be paid on a footage basis. Winkelman insisted that the house was an "hourly house" and that he wanted an hourly rate but only for 6-1/2 hours that day. Shenkman replied that the Company could not pay an hourly rate, only a footage rate. Winkelman then said to Shenkman, "Sorry you have a problem. I left at 3 p.m. I only want 6-1/2. If you check the material and find 10 hours, you can keep the extra. If less, that's the way it goes." Shenkman then put Finkelstein on the phone. Finkelstein told Winkelman that all jobs were to be hung at 400 feet an hour and, if Winkelman did not like it, he could look for another job. Winkelman was not assigned to work on that house the following day, a Friday, nor was he assigned any work the following Monday. The job in question was finished by insulators Bill Dixon and George Parker.

Winkelman complained about this treatment to shop steward Motta who brought the matter to the attention of Malek. Malek and Motta then visited the house in question and agreed with Winkelman's assessment that the house presented "unusual circumstances" warranting an hourly rate. Malek then called Finkelstein and told him that he thought the house should be paid at an hourly rate. Finkelstein objected. Malek explained to Finkelstein the nature of the job and why, in his opinion, it warranted hourly payment. As the conversation concluded, Finkelstein acceded to Malek's request. Shenkman phoned Winkelman on Wednesday, December 16, and informed him that he would be paid on an hourly basis for the house in question. He also gave Winkelman

an assignment for the following day. Winkelman told Shenkman during this conversation that he wanted to be paid for the time he missed the previous Friday and Monday when other mechanics were assigned to complete the house he had started. This request was eventually denied.

Both Winkelman and Mino assert that their working hours declined appreciably after they registered these complaints with the Union. There is little doubt that this is true, but it is equally true that the total number of hours worked by all of the Respondent's insulators also declined. Excerpts from a chart of employee working hours, attached to the General Counsel's brief, are as follows:

Week of	Total Hrs.	(fraction of hrs. omitted)	
		Mino's	Winkelman's
1980			
10/3	321	28	16
10/10	265	35	6
10/17	310	35	6
10/24	321	35	16
10/31	357	35	18
11/7	339	26	21
11/14	247	35	4
11/21	203	27	16
11/27	236	28	10
12/5	272	28	19
12/12	246	14	6
12/19	301	20	9
12/26	164	21	7
1981			
1/2	41	0	5
1/9	159	4	0
1/16	164	0	0
1/23	231	7	0
1/30	221	0	0
2/6	217	0	0
2/13	145	0	0
2/20	170	0	0
2/27	206	0	0
3/6	149	0	0
3/13	128	12	7
3/20	129	6	6
3/27	150	13	11
4/3	92	7	5
4/10	159	8	7
4/17	106	0	0

Respondent's insulators have found that, if their weekly hours of work drop below 10, it is financially advantageous to be laid off and to collect unemployment compensation. In the past Respondent has frequently honored requests for layoffs so that the mechanic in question would be eligible to collect a weekly compensation check. On January 19, 1981, Mino was working on

⁴ The 1980 addendum to the contract which permitted payment on a footage basis also provided: "Any unusual circumstances such as stairways, studio ceilings, or conditions in excess of ordinary scaffold or ladder—such work shall be excluded from the production rate as scheduled above, although paid for by the hour."

the blowing truck.⁵ At the end of the day he spoke with Finkelstein. He told him that as long as employees were driving the truck without pay and hanging insulation at 500 feet an hour and as long as he was not getting much work, the Company might as well lay him off. Finkelstein agreed and Mino was laid off on January 26.

Winkelman received no assignments during the month of January, despite the fact that he called the Company about once a week to get work. On February 2, he called Finkelstein to complain. Finkelstein asked Winkelman if the latter was drawing unemployment compensation. When Winkelman replied that he was, Finkelstein asked, "Why don't you keep on collecting it?" Winkelman asked if this remark meant that he was being laid off. Finkelstein said that he was being laid off because there was not enough work. Winkelman asked why he was the one being selected for layoff. Finkelstein replied that they were laying off two or three other insulators as well. Winkelman pressed him for an answer to the question of how did he choose the ones to be laid off. Finkelstein replied, "There's no seniority here. I lay off who I feel like laying off." In a second call to Finkelstein on that day, Winkelman asked him who else was being laid off. Finkelstein asked why he wanted to know, adding, "I don't have to give you any information I don't choose to." Winkelman then asked for a written notice of layoff containing reasons.

On February 16, 1981, Ralph P. Wood, administrative assistant in the office of the Carpenters district council, notified Respondent that it was filing a grievance to protest an asserted violation of the current collective-bargaining agreement. It requested a meeting on March 6, at the district council office for the purpose of resolving the grievance. The letter ended with the warning, "Failure to comply with the above request will result in immediate shut down of all your work in this area."

On February 17, Finkelstein sent Mino and Winkelman identical letters. They read that each had been laid off due to lack of work.

A grievance meeting was held as requested on March 6. The Union asserted that the insulators had been asked to hang 500 feet of insulation an hour. Both Finkelstein and Lazar denied that this was true. The Union also complained about the failure of Respondent to pay hourly rates for unusual or hourly jobs, asked that Mino and Winkelman be returned to work, and also asked that Respondent equalize the weekly hours of work assigned to its insulators. At the conclusion of the meeting Respondent agreed to these requests. The only request it refused to grant was the Union's request that Mino and Winkelman be given backpay for the period of time they were in layoff status. A day or two later, Mino and Winkelman returned to work.

⁵ Most of the insulation installed by Respondent comes in rolls and is nailed, tacked, stapled, or otherwise affixed in sheets to the surface of a building. Spots which are hard to reach are often completed with bulk insulation which is blown into crevices or recesses with a hose. Blowing insulation is basically a two-man job. Holes are often drilled into an outer wall, a hose is inserted, and the insulation is then inserted by air pressure generated by Respondent's blowing truck. One insulator stays in the truck and feeds insulation material into the hopper while the other operates the hose and inserts it into the access holes or other recesses of the building.

On or about March 23, Finkelstein, Office Manager Elain Beresh and Union Representatives John Rogers and Edward Malek had a luncheon meeting at a Holiday Inn to discuss conditions at the Company. The testimony concerning what was discussed at this meeting is in a sharp conflict, even as to who originally requested that the meeting be held.⁶ It is agreed that during the meeting they discussed the poor financial condition of the Company and that they also discussed employees Beaman, Winkelman, and Mino. I credit Malek's testimony that they discussed the equalization of hours and that Finkelstein said that work was getting to such a point that equalization meant that every insulator was getting practically nothing. I think it is clear that Finkelstein wanted the Union's consent to the layoffs of Beaman, Mino, and Winkelman. As Beresh put it, they just wanted to lay off these men "till things picked up." Finkelstein complained that Winkelman did not like to work on the other side of town where he lived and also complained that Mino had drilled through a wall from outside to inside, damaging the inside of a house to the extent that it cost Respondent money to repair the hole. I discredit Beresh's testimony that the Union agreed that it would be permissible to lay off these three men and credit Malek's testimony that there was not only no agreement to this effect but that Malek, in fact, threatened to take Respondent back to the grievance board and charge it with harassing Mino and Winkelman and discriminating against them. Malek also reminded Finkelstein that Respondent and the Union had an agreement that Mino and Winkelman would be reinstated and that the hours of Respondent's employees would be equalized. As noted, *infra*, the filing of a second grievance is just what the Union ultimately did.

On or about March 24, Winkelman was installing insulation in a colonial style house on Salem Creek Drive. Winkelman felt that insulating the family room and the garage ceiling warranted payment on an hourly rather than a footage basis, so he called Arnold Shenkman to request hourly payment. He told Shenkman that it took 1-1/2 hours to do 100 feet and that he wanted an extra half hour in his paycheck because of the difficulty he had encountered. Shenkman said he would check with Finkelstein.

When Winkelman received his paycheck, he noticed that the requested half-hour payment was not included. He called Arnold Shenkman to inquire and was told that Finkelstein had declined his request. At this point, Winkelman complained to shop steward Motta and asked him to contact Malek. Later, Motta reported back to Winkelman that Malek had intervened and that Winkelman would receive the requested half-hour pay. In fact, Winkelman did receive this payment in his final paycheck.

⁶ Finkelstein did not testify in this proceeding, either as to the events of March 23, or as to any other matter, even though he was present in the hearing room for part of the proceeding. Jack Shenkman did not testify at all and Arnold Shenkman was examined only on a limited number of matters. Under well-settled rules of evidence, I conclude that, had they testified on any of the factually disputed matters in this case, their testimony would have supported the General Counsel's case.

On April 10, 1981, Finkelstein sent identical memos to Mino and Winkelman, advising them that, as of Friday, April 10, 1981, each would be laid off for lack of work. Beaman was also laid off. Shortly thereafter, the district council filed a second grievance claiming that Respondent was violating the agreement by discriminating against employees when they complain about contract violations.

Sometime during the month of April, George McDonald, business agent for the district council, phoned Finkelstein to complain about the treatment of Mino and Winkelman. He reminded Finkelstein that an agreement had been reached, that Mino and Winkelman would be put back to work, and that the hours of employees would be equalized. Finkelstein's reply was that McDonald was not going to run his business and that he was not going to rehire Mino and Winkelman. In another conversation, Finkelstein told Malek that he would close the doors rather than take back either Mino or Winkelman. He also told Mino he would not take him back regardless of what the Union did.

Jack Shenkman and other managers of the Company held an employee meeting in May 1981. He told the employees that other shops were hanging 500 feet of insulation per hour and that his shop would do the same if necessary. He said that he could not understand why anyone would want to sit at home at 400 feet per hour rather than work at 500 feet per hour. He noted that the Company had only one driver so employees would have to drive the truck and load materials when necessary. He added that if anyone did not like it he could leave. He also stated that, if something was not done, employees would "end up like Dave Winkelman."

A hearing on the Union's second grievance was held by the joint settlement board on June 16, 1981. The board is composed of three union representatives and three company representatives. Mino, Winkelman, and Finkelstein spoke to the panel. Finkelstein defended the layoff, saying that the two men were laid off for lack of work. He also defended his action in requiring drivers and warehousemen to load trucks. At the end of the meeting, the joint settlement board deadlocked, voting 3 to 3 on a motion to find Respondent guilty.

While Mino and Winkelman have not worked for Respondent since April 10, 1981, Beaman returned to work early in May and has continued to work for Respondent for the entire period of time for which there is record evidence of employment. On June 15, Respondent placed a want ad in the Detroit News seeking insulators with blowing machine experience. In mid-September, Respondent hired insulator Dennis Crane, who worked about 2 months for the Company. Crane received an average of about 30 hours of work a week during this time.

Early in September 1981, Motta had a conversation with Jack Shenkman in Shenkman's office. Shenkman told Motta that two employees, Bill Dixon and George Parker, had gone to the board and had complained that they would be fired if they did not hang 500 feet an hour. Motta agreed with Shenkman that this was not so. Shortly thereafter, Beresh phoned Motta and asked him if he would sign an affidavit concerning the pending

charge. She informed Motta that the paper would accompany his paycheck and that he would sign it using the title "Shop Steward." Before obtaining the prepared affidavit, Motta received a phone call from David Gunsberg, Respondent's attorney. Gunsberg told Motta that he was investigating an unfair labor practice charge involving a layoff of employees who had refused to work footage. He told Motta that he did not have to talk with him if he did not want to do so. Gunsberg also told Motta that he would like him to sign a statement concerning the events involved in the charge but that he did not have to do so and no repercussions would take place if he refused.

Motta received a four-paragraph draft of an affidavit with his paycheck. The affidavit, which is in evidence, was obviously drawn up by Gunsberg. It states that Motta attended a company meeting in May and that at no time during the meeting did Jack Shenkman threaten employees with loss of employment if they refused to work for less than the contract rate and that, during the course of the discussion, Shenkman did not refer to Mino or to Winkelman or discuss their layoffs. Motta took the document home, read it, signed it, and returned it to the office.

C. Analysis and Conclusions

The events in this case which occurred before January 6, 1981, may not, by virtue of Section 10(b) of the Act, be relied on as the operative facts which constitute a violation of the Act. However, such events may be utilized if they "lay bare a putative unfair labor practice" occurring within the limitation period. *Machinists Local 1424, IAM v. NLRB*, 362 U.S. 411, 417 (1960). For this reason, an examination of Respondent's treatment of Mino and Winkelman in the fall of 1980 is in order, since the Company's behavior then provides a clear insight into the things it did during the 10(b) period. This examination is governed by a principle, set forth in the cases cited by the General Counsel and in many others as well,⁷ that the pressing of grievances for asserted noncompliance with a collective-bargaining agreement is concerted protected activity and union activity, even if the grievance is without merit. It is immaterial whether the grievance is presented by the employee alone or with the concurrence and assistance of a union representative.⁸

In November 1980, when first informed that he would be required to work at a piecework rate which was 25 percent below what the union contract required, Mino refused. He voiced his objection to Respondent's vice president and general manager, who told him to go home because he was not going to be paid at the rate of 400 feet per hour. On the same evening Finkelstein, Respondent's other vice president, made the same demand upon Mino and Mino refused a second time. Finkelstein's reaction was the same as Shenkman's. Mino could either work in violation of the contract or he would not work. When Mino persisted in his views, he was not assigned

⁷ *Bedford Cut Stone Co.*, 235 NLRB 629 (1978); *Perrenoud, Inc.*, 236 NLRB 804 (1978); *Unga Painting Corp.*, 229 NLRB 567 (1977).

⁸ *Bunney Brothers Construction Co.*, 139 NLRB 1516 (1962); *Lane Trenching*, 247 NLRB 1314 (1980).

to go to work the following day, although work was available and others were sent to do it.

Mino also sought union assistance in pressing a grievance with Respondent about being asked to load and drive the company truck for no compensation. While the Union's effort on Mino's behalf was successful in a narrow or technical sense, Mino paid a price in lost work assignments for this effort.

The same experience befell Winkelman. He called Respondent and insisted that the house on which he was working be paid at an hourly rate rather than on footage basis. He argued that "unusual circumstances" within the meaning of the union contract justified his request. The request was denied by Arnold Shenkman with the rejoinder that the Company could only pay a footage rate. Another similar complaint to Finkelstein brought the reply that, if Winkelman did not want to work on a footage basis, he could go elsewhere. As in Mino's case, Winkelman was not employed on the following day to finish the job, although there was work available. Winkelman sought and received union assistance in pressing his grievance. As in Mino's case, the Union was successful in a narrow or technical sense in obtaining relief. However, Winkelman also paid a price in lost job opportunities which, I conclude, was causally connected to his insistence that Respondent abide by the terms and conditions of its collective-bargaining agreement.

These actions on the part of Respondent clearly show animus against Mino and Winkelman, and, by necessary inference, against anyone else on its staff who had the temerity to insist that Respondent observe the terms and conditions of the agreement it had signed. These acts also evidence a punitive disposition on the part of Respondent which surfaced again in later actions which are not time barred from consideration.

There is no factual dispute that, on or about January 19, 1981, a date well within the 10(b) period, Mino asked to be laid off because he was not receiving enough hours of work from Respondent to make it worth his while as he could make more money drawing unemployment compensation. Notwithstanding the fact that Mino requested to be laid off, the General Counsel argues that this termination was, in fact, a constructive discharge which was the product of a situation generated by Respondent to achieve just this result. Terminations which take place under such circumstances are as much a violation of the Act as if the discharge were the act of the employer. *Jack Hodge Transport*, 227 NLRB 1482 (1977); *Chateau de Ville*, 233 NLRB 1161 (1977); *Sav-Mor Food Centers*, 234 NLRB 775 (1978).

The evidence bearing on this contention is sharply debatable. As noted, *supra*, Mino received only 7 hours of work during January. Respondent counters with the fully supported but general argument that business was bad. In examining the facts underlying these contentions, we are faced with the necessity of evaluating a close question of degree. This evaluation is necessarily affected by the animus, discussed above, which Respondent bore toward Mino because of his earlier insistence upon compliance with the contract terms. Record evidence indicates that Mino not only received a paltry amount of work during January but that the amount he received

was less than what was given to any of Respondent's other employees except Winkelman and a third employee, Charles Sloney. During this slow period, eight employees received not only more work but considerably more work than Mino did. It is clear that Mino would be in a better position to support his wife and her six children on unemployment compensation than on the wages he received from Respondent in January 1981. This disparity in apportioning work, later the subject of a union grievance, and the fact that two of the three employees who suffered most from this disparity were "strict constructionists" of the collective-bargaining agreement, suggest that Respondent was retaliating against them for their earlier insistence on payment under the terms of the contract. Accordingly, I conclude that Mino was constructively laid off for engaging in union activities and in protected concerted activities in violation of Section 8(a)(1) and (3) of the Act, and the fact that Mino requested the layoff was simply the product of a larger design according to which Respondent sought to place Mino in the financially untenable position where he had no other alternative.

Respondent's treatment of Winkelman was even more drastic. He received no work assignments at all in January. Instead of offering to resign, he protested the treatment. The response to his protest was a suggestion on the part of the employer that he continue to collect unemployment compensation. When he pressed Finkelstein for an answer, the latter admitted that Winkelman was being laid off. In a delayed reply to Winkelman's demand for a written notice, Respondent stated in writing that the reason for the layoff was a lack of work.

Winkelman also questioned Respondent's method of selection of employees for layoff. Finkelstein's reply was abrupt. He told Winkelman that there was no contractual seniority at the Company so he was free to lay off whom he chose. The latter statement is only partly true. Seniority is a right conferred by contract and, in the absence of agreement, no job protection stemming solely from length of service exists.⁹ While Finkelstein was contractually free to ignore seniority in selecting employees for layoff, the question then arises: If seniority was not being followed, then what was? Finkelstein did not take the stand and say. At least with respect to the first layoff, no justification for the selection of Winkelman can be found in the record. In light of the animus which marked Respondent's attitude toward Winkelman, I conclude that, on February 2, 1981, Respondent laid off Winkelman because of his union activities and his concerted protected activities in violation of Section 8(a)(1) and (3) of the Act.

Implicit in this conclusion is the separate conclusion that, on and after January 6, 1981, the beginning of the 10(b) period, Respondent reduced the hours assigned to Mino and Winkelman because of their concerted protected activities and union activities. This action violates Section 8(a)(1) and (3) of the Act, quite apart from the layoffs which ensued as a result of his decision.

⁹ Winkelman was hired by Respondent on January 27, 1969, and had longer service than all but four of Respondent's insulators.

The Union grieved the layoffs of Winkleman and Mino and obtained their reinstatement, although without any backpay. Both men went back to work and were terminated again on April 10, 1981. In its notification memos to both men, dated April 10, Respondent asserted that they were laid off. However, in the 14 months which elapsed between the date of the layoff and the date of the hearing in this case, neither man has worked for Respondent. Finkelstein admitted to Malek that he would close up the Company before he would take them back. During this interim, the Company recalled Beaman, advertised in the paper for new insulators, and hired another insulator who has since left its employ. These developments make it crystal clear that Mino and Winkleman were not merely laid off on April 10. They were permanently separated from Respondent's complement of employees. Respondent's assertion that they were laid off is a fiction. Under well-settled precedent, the giving of a false reason for a termination is, in and of itself, some evidence of discriminatory intent.

Before the case was considered by the joint settlement board, Union Representative McDonald spoke with Finkelstein concerning the discharge. McDonald protested Respondent's action, claiming that there had been an agreement that Mino and Winkleman be reinstated. Finkelstein's reply was that he was not going to take Mino and Winkleman back, regardless of what the Union did. He made essentially the same statement to Mino. I construe Finkelstein's remarks simply as a rejection of the Union's effort to adjust a grievance at a level lower than the joint settlement board and not as a violation of Section 8(a)(1) of the Act. Accordingly, so much of the amended complaint which alleges that these remarks constitute an unfair labor practice should be dismissed.

Respondent asserts that the Union actually agreed that Mino, Winkleman, and Beaman might properly be selected for a layoff which the Company was contemplating owing to its distressed economic condition. At first blush this assertion is difficult to believe, since the Union had just prevailed in a grievance adjustment which secured their reinstatement. When it is made in the face of a corroborated union denial and the prompt filing of a grievance following the terminations, the assertion becomes quite incredible. Mino was ostensibly selected for layoff because his wife had supplemental earnings and also because he had damaged the wall of a customer's house sometime previously and had cost the Company \$600 in repairs. Moreover, the claim was made that Mino refused to work on the blowing machine. Winkleman was, assertedly, selected because he did not like to work on the opposite side of the city of Detroit from the locality in which he made his home and because he called infrequently to request work assignments. Using an accident which occurred 6 months before to justify a second layoff has the clear ring of pretext. I credit Mino's testimony that he never refused to work on the blowing machine and it is clear that he did work on the blowing machine from time to time. The fact that Mrs. Mino drew survivor's benefits from social security for some of her children by a previous marriage is irrelevant to Mino's job performance. Winkleman's wife had no income, yet this fact did not immunize Winkleman for layoff. As for

the fact that Mino requested a layoff in January in order to draw unemployment benefits, this can hardly be relied on as the basis for a layoff selection since it was an element in an illegal plan to remove Mino from the payroll.

With respect to Winkleman, I credit his testimony that he never refused work. The second asserted reason is, I believe, irrelevant and pretextual, in that it was not only the practice for employees to call in for work but for the Company itself to phone employees to make assignments when work was available. Accordingly, I conclude that, by discharging Thomas Mino and David Winkleman on April 10, because they engaged in union activities and concerted protected activities, Respondent herein violated Section 8(a)(1) and (3) of the Act.

Respondent interposes the affirmative defense that the Board should ignore the substantive issues involved both in the initial layoffs and in the April 10 discharges because each set of terminations was disposed of by grievances filed by the Union. It argues that, under the Board's decision *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), the Board should defer to the resolution of these issues which was achieved by the machinery established by the parties themselves for this purpose. The contention is without merit.

The initial layoffs were not the subject of an arbitration proceeding but an agreement reached at an earlier stage of the grievance machinery between Respondent and the Union. This agreement had barely been put into effect when Respondent breached its provisions and terminated Mino and Winkleman a second time. A party to a grievance procedure is in no position to breach an agreement reached in the course of that procedure and then rely on that procedure as a basis for seeking deferential in a Board proceeding.

On June 16 there was a hearing by the joint settlement board on a second grievance filed by the Union relating to the April 10 discharges. The record is silent as to when this grievance was formally filed. It should be noted that no arbitration award was made by a neutral following this hearing. The proceeding consisted of discussion before a joint board made up of an equal number of union and management representatives, followed by a tie vote on a motion to find Respondent guilty. In proper cases, the Board will defer to resolutions of grievances made by joint committees, just as it does to formal arbitration awards which comply with *Spielberg* standards. *Denver-Chicago Trucking Co.*, 132 NLRB 1416 (1961); *McLean Trucking Co.*, 202 NLRB 710 (1973), reversed on other grounds, *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974). However, before this may occur, there must in fact be a resolution of the grievance. The contract between the parties establishing the joint settlement board states, *inter alia*, that:

The Board shall hear witnesses and examine other evidence relating to the matter before it. A record of meetings and decisions rendered shall be kept. The Board shall make written findings of fact and render a decision which shall be final and binding on all parties to the dispute.

The contract goes on to spell out penalties which may be imposed by the joint settlement board, which include fines and backpay awards. There is no appeal from a determination of the joint settlement board so presumably one who obtains an award may strike or lock out in order to enforce it.

In this case, the joint settlement board did not render a decision, as required by the contract provisions. Upon a motion to find Respondent guilty of a contract violation, the joint board deadlocked and this deadlock has never been broken. There were no written findings of fact in support of the award and, in the nature of things, there could not have been since there was no award. The net effect of the vote by the joint board was to leave the grievance forever pending and unresolved. This type of result is not the kind of grievance resolution which the *Spielberg* doctrine contemplates, and it should not be used as a basis for deferral of a decision of an unfair labor practice complaint. Accordingly, I would not defer to either purported contractual adjustment, as requested by Respondent. See *Keller-Crescent Co.*, 217 NLRB 685 (1975).

In May 1981, Jack Shenkman and others met with Respondent's employees to discuss the Company's difficult economic straits. In the course of this discussion, Shenkman told employees that, if they did not want to drive the company truck without compensation and did not want to work at a rate which was 100 feet per hour in excess of the contractor rate they could quit. He added that if something were not done, they would all end up like Winkelman, who, as found above, was fired for insisting on compliance with the terms and conditions of the collective-bargaining agreement. This statement by Shenkman is a not-too-veiled threat that employees would have to work in violation of the contract and, if they complained, they would be fired. Such a threat to take reprisal against employees for insisting on compliance with the terms and conditions of a collective-bargaining agreement violates Section 8(a)(1) of the Act.

In collecting evidence to support its defense of an unfair labor practice charge, Jack Shenkman called Motta into his office and began to discuss the allegations in the pending charge. Neither he nor Beresh made assurances against reprisals before they asked Motta to sign a written statement in support of the Company's position, nor did they tell him that he was free not to make a statement at all if he did not want to do so. All of these prerequisites to the investigation of employee witnesses in a Board case are required of an employer by the Board's decision in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964). Such precautions were not taken by either company official. Later, Gunsberg, the company attorney, spoke with Motta. He did give Motta the assurances required by *Johnnie's Poultry* before talking to him and ostensibly drew up the affidavit which Motta signed after complying with these requirements. Whether Gunsberg's assurances cured omissions by Shenkman and Beresh do not, under the circumstances of this case, avail Respondent anything because, once the affidavit had been prepared, Beresh notified Motta that it would be given to him with his paycheck. No reason other than subtle intimidation could have prompted this move. The docu-

ment could have been handed to Motta on any other occasion or simply mailed to him for his examination and signature. Instead, Beresh chose to let Motta know that his cooperation with Respondent in the investigation at hand was a matter which could affect his livelihood. The message conveyed by attaching the prepared document to Motta's paycheck was that he had better sign it or else. This message wholly negates the previous effort by Respondent's counsel to follow the *Johnnie's Poultry* rules and constitutes a threat which violates Section 8(a)(1) of the Act. I so find and conclude.

Upon the foregoing findings of fact, and upon the entire record herein considered as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent City Service Insulation Company is now and at all times material herein has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Carpenters' District Council, Detroit and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off and later discharging Thomas Mino and David Winkelman because they filed grievances and insisted that Respondent comply with the terms and conditions of a collective-bargaining agreement, Respondent herein violated Section 8(a)(3) of the Act.

4. By reducing the working hours of Thomas Mino and David Winkelman because they filed grievances and insisted that Respondent comply with the terms and conditions of a collective-bargaining agreement, Respondent herein violated Section 8(a)(3) of the Act.

5. By the acts and conduct set forth above in Conclusions of Law 3 and 4; by threatening employees with discharge if they insisted on compliance by Respondent with the terms and conditions of a collective-bargaining agreement; by interrogating employees and impliedly threatening them with reprisal if they refused to give statements concerning matters involved in a pending unfair labor practice, Respondent herein violated Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take other affirmative actions which are designed to effectuate the purposes and policies of the Act. Since the violations of the Act found herein were repeated, pervasive, and demonstrate a wholesale disregard by this Respondent of the statutory rights of its employees, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). The recommended Order will provide that Respondent be required

to make whole Thomas Mino and David Winkelman for any loss of earnings which they may have suffered by reason of the discriminations practiced against them, including the reduction of their opportunities for earnings in January 1981. Backpay should be computed in accordance with the *Woolworth* formula,¹⁰ with interest thereon at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. *Olympic Medical Corp.*, 250 NLRB 146 (1980); *Isis Plumbing Co.*, 138 NLRB 716 (1962). I will also recommend that Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

Upon the foregoing findings of fact, and conclusions of law, and on the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER¹¹

The Respondent, City Service Insulation Company, Southfield, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge if they insist that the Company comply with the terms and conditions set forth in their collective-bargaining agreement.

(b) Interrogating employees and impliedly threatening them with reprisal if they refuse to give a statement concerning matters involved in a pending unfair labor practice charge.

(c) Discouraging membership in and activities on behalf of Carpenters' District Council, Detroit and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other labor organization, by reducing the working hours of employees, laying off or discharging employees, or otherwise discriminating against them in their hire or tenure.

¹⁰ *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) By any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Offer full and immediate reinstatement to Thomas Mino and David Winkelman to their former or substantially equivalent employment and make them whole for any loss of pay or benefits which they have suffered by reason of the discriminations found herein, in the manner described above in the section entitled "Remedy."

(b) Expunge from its files any reference to the layoff or discharge of Thomas Mino or David Winkelman and notify them in writing that this has been done and that evidence of these unlawful layoffs and discharges will not be used as a basis for future discipline against them.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll and other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Post at Respondent's place of business in Southfield, Michigan, copies of the attached notice marked "Appendix."¹² Copies of said notice, on forms provided by the Regional Director for Region 7, shall be posted immediately upon receipt thereof and shall be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that, insofar as the amended complaint alleges matters which have not been found herein to be violations of the Act, said allegations are hereby dismissed.

¹² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."